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No. 04-5323

IN THE
SUPREME COURT OF THE UNITED STATES

LAROYCE LATHAIR SMITH,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Court of Criminal Appeals of Texas

RESPONDENT'S BRIEF IN OPPOSITION

GREG ABBOTT
Attorney General of Texas

BARRY R. McBEE
First Assistant Attorney General

DON CLEMMER
Deputy Attorney General
For Criminal Justice

*Counsel of Record

GENA BUNN
Chief, Postconviction
Litigation Division

*EDWARD L. MARSHALL
Deputy Chief, Postconviction
Litigation Division

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400

ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

I. Whether the lower court's decision denying Smith's Eighth Amendment claim under *Penry v. Lynaugh*, 492 U.S. 302 (1989), should be reversed in light of *Tennard v. Dretke*, 124 S. Ct. 2562 (2004).

II. Whether the supplemental mitigation instruction submitted during Smith's punishment trial violated the Eighth Amendment rationale of *Penry v. Johnson*, 532 U.S. 782 (2001).

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner LaRoyce Lathair Smith ("Smith")[1] was properly convicted and sentenced to death for the brutal murder of Jennifer Soto. In the instant petition for certiorari review of the lower court's denial of habeas corpus relief, Smith argues that his Eighth Amendment rights — as defined by *Penry I*,[2] *Penry II*,[3] and *Tennard v. Dretke*[4] — were violated by the jury instructions and special issues submitted during the punishment phase of his 1991 trial. Petition at 13-20. However, Smith's claims are without merit and certiorari review should be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

The Court of Criminal Appeals of Texas set forth the evidence supporting Smith's capital murder conviction in its opinion on direct appeal:

> Around 11:30 p.m. on January 7, 1991, [Jennifer Soto] was working as the shift manager at a Taco Bell in Dallas County. She was responsible for closing and cleaning the store and completing the appropriate paperwork. A co-employee, Travis Brown, was waiting inside the restaurant for [Soto] to finish her duties so that she could give him a ride home. Brown testified that [Smith] arrived at the restaurant by automobile with several other youths. [Smith] and two others then got out of the car and knocked on the door, claiming to need to use the telephone. Brown would not let the three enter the establishment because it was closed. He did, however, go to the back of the store and get [Soto]. [Soto] recognized [Smith] as an ex-employee and allowed him to enter. [Smith] then let his two colleagues into the restaurant. Brown testified at trial that [Soto] then returned to the back of the store to finish some paperwork while [Smith] used the phone. After he hung up the phone, [Smith] came to the front of the restaurant and told Brown to leave because they were going to rob the Taco Bell. However, Brown professed that he could not leave. [Smith] then went to the back office where [Soto] was working. Shortly after that, Brown heard some "yelling" and went to check it out. He found [Smith] "pistol-whipping" [Soto] while he had her in a headlock. After Brown attempted to get [Smith] to stop the attack, [Smith] stepped back and fired a shot at [Soto].[5] [Smith] then walked into the kitchen, grabbed a butcher knife, and returned to the office where he stabbed [Soto] three or four times. After this, all three perpetrators left the restaurant. Just before exiting, [Smith] told Brown that he would kill him if he talked to the police. However, after [Smith] left, Brown called the police.

Smith v. State, No. 71,333, at 1-2 (Tex. Crim. App. 1994) (unpublished opinion) (emphasis in original).[6] Smith was convicted of capital murder on June 14, 1991 for murdering Soto during the course of committing or attempting to commit robbery. CR 3, 108, 121-22.[7]

II. Facts Relating to Punishment

The state court also summarized the evidence which supported the jury's finding of future dangerousness:

> Looking at the evidence in the light most favorable to the verdict, we find the circumstances of the offense to be rather cruel. [Smith] knew [Soto] and even hugged her when he came into the restaurant to use the phone. However, either in an attempt to get her to cooperate in opening the restaurant's safe or because of her inability to do so, he held her around the neck and hit her with the gun until part of it broke. [Smith] then shot her in the back. Apparently still not feeling finished with his handiwork, [Smith] went into the kitchen to

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1 Respondent State of Texas will be referred to as "the State.

2 *Penry v. Lynaugh*, 402 U.S. 302 (1989).

3 *Penry v. Johnson*, 532 U.S. 782 (2001).

4 124 S. Ct. 2562 (2004).

5 Brown clarified that he didn't think that [Smith] *shot* [Soto], just that he shot *at* her. However, the medical examiner's testimony revealed that [Soto] was shot once in the back.

6 The state court's direct appeal opinion is attached to Smith's Petition as Appendix 2.

7 "CR" refers to the Clerk's Record of pleadings and documents filed with the court during trial, followed by page numbers. "RR" refers to the Reporter's Record of transcribed trial proceedings, preceded by volume number and followed by page numbers.

get a butcher knife. On his return, he proceeded to stab [Soto] several times in the neck, chest, and thigh, including several wounds which were characterized by the State as "torture type wounds."

The manner in which the offense was committed illustrated some degree of forethought and deliberation on [Smith]'s part. Furthermore, he appeared to be both the planner and the initiator of the crime. Some time before the actual incident, [Smith] evidently had formulated a plan to rob this Taco Bell because he "needed some money for court." Two of his companions heard him talking about the intended robbery over the phone, and [Smith] was later heard to ask the driver of the car if "he was going to do that for me" (apparently referring to the robbery considering all of the statements in context). After the driver replied "I guess so," the group proceeded to a house where [Smith] retrieved another person and was seen to have a gun in his hand. The group then proceeded to the Taco Bell. When they first arrived at the restaurant, [Smith] and two others got out of the car, but did not enter the restaurant. They got back into the car and began to drive away, but [Smith] encouraged the driver to turn around and go back.

[Smith] was nineteen years old at the time of this offense, and he was shown to have one prior conviction for misdemeanor assault.[8] [Smith] had also been stopped for the offense of "pedestrian in roadway," whereupon it was discovered that he had outstanding traffic warrants. During a search incident to [Smith]'s arrest on these outstanding warrants, police discovered a baggie in [Smith]'s underwear containing ten rocks of crack cocaine.[9]

Appendix 2 at 3-4.

The lower court also described the mitigating evidence presented on Smith's behalf during punishment:[10]

> First, [Smith] offered evidence of his limited mental capacity. [Smith]'s mother testified that [Smith] was "a slow learner" in school. He had an IQ of 78 and possible organic learning disabilities. [Smith] attended special-education classes and his behavior was often noted as "exemplary," but he dropped out of school in the ninth grade at the age of eighteen. He committed this capital murder at the age of nineteen.
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> * * *
>
> Second, [Smith] offered evidence of his difficult family background. His father had been in prison for robbery, was involved with a motorcycle gang, consorted with other women, used alcohol and drugs, and stole from his own family. This situation upset [Smith]. Because the family did not have a lot of money, [Smith] began looking for work as a young teenager. According to defense witnesses, [Smith] suffered because of his father's thefts from the family and from a lack of money in the home.

Ex parte Smith, 132 S.W.3d 407, 413 (Tex. Crim. App. 2004).[11]

Smith was then sentenced to death based on the jury's answers to the special issues. CR 120-23.[12] As the lower court explained:

> Under the law in effect at the time of the trial, the jury was then given two special issues during the punishment phase: First, was the killing deliberate? And second, does the defendant pose a continuing danger to others? Because this trial took place during that two-year hiatus between the Supreme Court's decision in *Penry I* and the Texas Legislature's enactment of a new statutory special issue in response to *Penry I,* the trial judge also gave the jury a non-statutory nullification instruction. That supplemental instruction read:

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[8] The evidence indicated that this conviction began as a felony aggravated assault. The facts show that [Smith] began seeing a girl whose boyfriend, Christopher Standmier, went off to college after agreeing to have an open relationship. However, when the girl started seeing [Smith], Standmier wrote her cruel letters and broke off the relationship. One day when Standmier was back in town, [Smith] saw him and began harassing him and a fight ensued. [Smith] pulled a baseball bat from his car and struck Standmier in the ribs and broke the bat over his head. Then [Smith] ran back to his vehicle and pulled out a gun. Standmier backed down and [Smith] left.

[Smith] was originally charged with aggravated assault, but the charges were reduced to a misdemeanor when Standmier got tired of taking off from school to come to court.

[9] The actual weight of the cocaine measured only one-fifteenth gram.

[10] "While no psychiatric evidence was admitted, character evidence was presented by several high school teachers and other officials, family members, the family's reverend, and various others ...." Appendix 2 at 5.

[11] The lower court's opinion denying habeas relief is attached to Smith's Petition as Appendix 1.

[12] The punishment charge and verdict form submitted to the jury are attached to Smith's Petition as Appendix 3.

You are instructed that you shall consider any evidence which, in your opinion, is mitigating. Mitigating evidence is evidence that reduces the Defendant's personal or moral culpability or blameworthiness, and may include, but is not limited to, any aspect of the Defendant's character, record, background, or circumstances of the offense for which you have found him guilty. Our law does not specify what may or may not be considered as mitigating evidence. Neither does our law provide a formula for determining how much weight, if any, a mitigating circumstance deserves. You may hear evidence which, in your judgment, has no relationship to any of the Special Issues, but if you find such evidence is mitigating under these instructions, you shall consider it in the following instructions of the Court. You, and each of you, are the sole judges of what evidence, if any, is mitigating and how much weight, if any, the mitigating circumstances, if any, including those which have no relationship to any of the Special Issues, deserves.

In answering the Special Issues submitted to you herein, if you believe that the State has proved beyond a reasonable doubt that the answers to the Special Issues are "Yes," and you also believe from the mitigating evidence, if any, that the Defendant should not be sentenced to death, then you shall answer at least one of the Special Issues "No" in order to give effect to your belief that the death penalty should not be imposed due to the mitigating evidence presented to you. In this regard, you are further instructed that the State of Texas must prove beyond a reasonable doubt that the death sentence should be imposed despite the mitigating evidence, if any, admitted before you.

You are instructed that you may deliberate as a body about mitigating circumstances, but you are not required to reach a unanimous verdict as to their existence or weight. When you vote about the Special Issues, each of you must decide for yourself whether mitigating circumstances exist and, if so, how much weight they deserve.

These supplemental instructions explicitly told the jury that:

1. It "shall" consider any and all mitigating evidence;
2. The mitigating evidence might, but need not, relate to the defendant's character, record, background, or any circumstances of the offense;
3. Mitigating evidence is any evidence which reduces the defendant's personal or moral culpability or blameworthiness;
4. Mitigating evidence need not have any relationship to either of the Special Issues;
5. The jurors need not be unanimous about what specific evidence each one considers mitigating;
6. The jurors each decide what evidence is mitigating and how much weight to give it;
7. If the jury finds, from the mitigating evidence, that the defendant should not be sentenced to death, then it "shall" answer one of the Special Issues "No"; and
8. The State must prove, beyond a reasonable doubt, that the death penalty should be imposed despite the mitigating evidence.

Appendix 1 at 3-4 (footnotes omitted).

III. Direct Appeal and Postconviction Proceedings

Smith's conviction and sentence were affirmed by the lower court on June 22, 1994. Appendix 2. This Court denied certiorari review. *Smith v. Texas,* 514 U.S. 1112 (1995). Smith then sought state collateral review but his application was dismissed as untimely filed on July 15, 1998. *Ex parte Smith,* 977 S.W.2d 610 (Tex. Crim. App. 1998). This Court again declined to issue a writ of certiorari. *Smith v. Texas,* 525 U.S. 1148 (1999). Smith next filed a petition for postconviction relief in the United States District Court for the Northern District of Texas, but this proceeding was ultimately dismissed without prejudice so that Smith could return to state court pursuant to newly enacted procedures for untimely applications. *Smith v. Johnson,* No. 3:98-CV-1778 (N.D. Tex. 1999); TEX. CODE CRIM. PROC. art. 11.071, § 4A (West 1999). Smith's second state habeas application was denied

on its merits on April 21, 2004. Appendix 1. The instant petition for certiorari review followed.[13]

ARGUMENT

I. The Questions Presented for Review Are Unworthy of the Court's Attention.

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." SUP. CT. R. 10 (West 2004). Smith advances no compelling reason in this case, and none exists. Further, because there is no constitutional right to state habeas corpus proceedings, it follows that the denial of state habeas relief does not present a federal question for certiorari review. As Justice O'Connor has described the role of state habeas corpus proceedings:

> A post-conviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment. Nothing in the Constitution requires the States to provide such proceedings ... nor does it seem to me that the Constitution requires the States to follow any particular federal model in those proceedings.

Murray v. Giarratano, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring).

Similarly, Justice Stevens has noted that:

> This Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims.

Kyles v. Whitley, 498 U.S. 931, 932 (1990) (Stevens, J., concurring). Smith's claims are now due to be raised in federal habeas proceedings, which are currently pending. Thus, it appears that "the more appropriate avenue" is now available for the litigation of the instant claims.

[13] On July 23, 2004, Smith obtained appointed counsel in order to pursue habeas corpus relief once again in the federal district court. *Smith v. Dretke,* No. 3:04-CV-01576 (N.D. Tex.). No petition has yet been filed, although the State has agreed to waive limitations provided that Smith files his petition within ninety days of the disposition of the instant certiorari petition.

II. The Lower Court Correctly Held That Smith's Jury Was Not Altogether Prevented from Considering His Mitigating Evidence of Limited Mental Capacity and Difficult Family Background in Answering the Punishment Phase Special Issues.

Smith contends that his jury was deprived of a vehicle with which to give mitigating effect to his evidence of limited intelligence and troubled upbringing in violation of *Penry I.* Petition at 13-14, 15-16. Smith also alleges that the lower court erred in invoking the Fifth Circuit's "constitutional relevance" standard, which was rejected by this Court in *Tennard,* in denying habeas relief. *Id.* at 14-15. However, the court below properly determined that "the two special issues given in this case provided a sufficient vehicle for the jury to give effect to [Smith]'s mitigating evidence of a troubled childhood and of his somewhat limited mental ability." Appendix 1 at 6. This is because "[Smith]'s mental limitations were surely relevant to whether he acted deliberately in committing this robbery-murder and both his learning disability and troubled background were relevant to whether he would constitute a future danger to society." *Id.* at 7-9. As a result, certiorari should be denied.

A. The special issues were constitutionally adequate vehicles for the consideration of Smith's mitigating evidence.

In *Penry I,* this Court was forced to reconcile its plurality opinions in *Woodson v. North Carolina,* 428 U.S. 280, 303-04 (1976) (which requires that a capital sentencing authority be allowed to consider mitigating circumstances), *Jurek v. Texas,* 428 U.S. 262, 276 (1976) (explaining that the pre-1991 Texas special issues — deliberateness and future dangerousness — allowed Texas juries to consider mitigating circumstances), and the unique, double-edged mitigating circumstances presented in *Penry I* itself (mental retardation, brain

damage, and severe child abuse). 492 U.S. at 320-25. The resultant decision was a carefully crafted and, ultimately, case-specific compromise that this Court has repeatedly refused to extend to other types of mitigating evidence.

At the root of *Penry I* are found the competing interests involved in capital sentencing: the requirement for an individualized determination of moral culpability based on both aggravating and mitigating factors, and the need to adequately guide and channel a jury's consideration of these factors. The *Woodson* line of cases first construed the Eighth Amendment to require that a capital sentencing jury not be precluded from consideration, as a mitigating factor, of the character and record of the individual offender, as well as the circumstances of the particular offense. *Eddings v. Oklahoma,* 455 U.S. 104, 111-12 (1982); *Lockett v. Ohio,* 438 U.S. 586, 604 (1978) (plurality opinion); *Woodson,* 428 U.S. at 303-04. As the Court explained, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry I,* 492 U.S. at 319 (quoting *California v. Brown,* 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). However, not all evidence presented as mitigating must be considered as such. *Franklin v. Lynaugh,* 487 U.S. 164, 174 (1988) (plurality opinion); *Skipper v. South Carolina,* 476 U.S. 1, 7 n. 2 (1986). Nor is it constitutionally required that consideration of mitigating evidence be structured or balanced in any particular way. *Franklin,* 487 U.S. at 179; *Booth v. Maryland,* 482 U.S. 496, 502 (1987), *overruled on other grounds, Payne v. Tennessee,* 501 U.S. 808 (1991); *Zant v. Stephens,* 462 U.S. 862, 875-76 (1983).

Prior to the development of the rule in *Eddings,* the *Jurek* plurality held that the Texas special issues were constitutional because "the enumerated questions allow consideration of

particularized mitigating factors," *e.g.,* a defendant's criminal record (or lack thereof), the range of severity of such a record, his youth, the circumstances of the crime, duress and mental or emotional disturbance, and remorse.[14] 428 U.S. at 272-73. This conclusion was reaffirmed in *Lowenfield v. Phelps,* 484 U.S. 231, 245 (1988), and in *Franklin,* 487 U.S. at 182. Thereafter, the *Penry I* Court held that the Texas special issues, as applied to Penry, did not allow consideration of his specific evidence of mental retardation, brain damage, and severe child abuse.[15] 492 U.S. at 322. This was because the evidence, which suggested that Penry was "less able ... to control his impulses or to evaluate the consequences of his conduct," did not necessarily suggest that his murderous actions were less than deliberate. *Id.* Additionally, Penry's evidence indicated that he was unable to "learn from his mistakes," and was relevant to the future dangerousness special issue only as an *aggravating* factor. *Id.* at 323. Thus, neither special issue provided a vehicle for the jury to give mitigating effect to Penry's "two-edged" evidence. *Id.* at 324.

During its next term, however, the Court held that a mere possibility that the jury was precluded from considering relevant mitigating evidence did not establish Eighth Amendment error. *Boyde v. California,* 494 U.S. 370, 380 (1990). Rather, such error occurred only if there was a "reasonable likelihood" that the jury applied its instructions in

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[14] Smith fails to cite *Jurek* whatsoever or acknowledge that it remains controlling authority. *See Graham v. Collins,* 506 U.S. 461, 474-77 (1993) (explaining that *Penry I* is the exception to *Jurek*).

[15] Penry's evidence suggested that he was mildly or moderately retarded, may have suffered traumatic damage to his brain at birth or as a result of later injuries, and was frequently beaten about the head and locked in his room as a child. *Penry I,* 492 U.S. at 307-09. The Court specifically noted that its *Penry I* opinion did not negate the facial validity of the Texas special issues, nor did it change the fact that other types of mitigating evidence could be considered under the plain language of the special issues. *Id.* at 315-19.

a way that prevented the consideration of such evidence. *Id.* The Court further limited its holding in *Saffle v. Parks*, 494 U.S. 484 (1990), applying *Teague*[16] to preclude relief where there was no indication that the jury was "altogether prevented" from giving some effect to the evidence. *Id.* at 490-92. Indeed, the Court would continue to endorse *Jurek* and limit the application of *Penry I* where the mitigating evidence presented was not solely aggravating when viewed through the lens of the special issues.

For example, in *Graham*, the Court imposed a *Teague* bar and declined to "read *Penry* [*I*] to effect a sea change in the Court's view of the constitutionality of the ... Texas death penalty statute." 506 U.S. at 474. Instead, the Court distinguished the thrust of Graham's mitigating evidence — "that his brief spasm of criminal activity ... was properly viewed, in light of his youth, his background, and his character, as an aberration that was not likely to be repeated" — from Penry's. *Id.* at 475. The "mitigating significance" of Graham's evidence did not compel affirmative answers to the special issues as did Penry's evidence, but instead suggested that Graham would *not* be a future danger. *Id.* at 475-76. Thus, as in *Boyde*, the possibility that mitigating evidence might have "*some* arguable relevance beyond the special issues" was immaterial as long as the jury was able to give effect to the evidence in some meaningful way. *Id.* at 476 (emphasis in original).

The same term, the Court reconsidered a *Graham*-type challenge to the special issues on direct appeal, where it was not bound by *Teague*. *Johnson v. Texas*, 509 U.S. 350, 352 (1993). In *Johnson*, the Court again concluded that "[i]t strains credulity to suppose that the

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[16] *Teague v. Lane*, 489 U.S. 288 (1989). The Court had previously found that *Teague* did not bar the relief sought in *Penry I*, because Penry merely requested vindication of his Eighth Amendment rights under *Eddings* as required by the evidence presented "*in his particular case*." *Penry I*, 492 U.S. at 318-19 (emphasis in original). This holding unequivocally did "not 'impos[e] a new obligation' on the State of Texas." *Id.* at 319 (quoting *Teague*, 489 U.S. at 301).

jury would have viewed the evidence of [Johnson]'s youth as outside its effective reach in answering the [future dangerousness] special issue." *Id.* at 368. This is the case even if the mitigating evidence could also be viewed as aggravating; constitutional error results only if the evidence is unavoidably aggravating within the context of the special issues. *Id.* at 368-69. As in *Graham* and *Johnson*, there was no reasonable likelihood that Smith's jury was prevented from giving effect to his mitigating evidence when answering the special issues.

As summarized *supra*, Smith's mitigating evidence consisted entirely of lay testimony regarding his troubled childhood and limited mental ability. This evidence was within the effective reach of the jury. Unlike in *Penry I*, Smith did not present evidence of any mental impairment or childhood trauma that would tend to diminish his impulse control or ability to evaluate the consequences of his mistakes. Contrary to Smith's conclusory argument, the evidence was not solely aggravating and did not "undercut the jury's ability to truthfully answer the special issues so as to produce a sentence less than death." Petition at 13-14. Instead, Smith's "evidence shows the reverse: despite [his] limitations and difficulties, his behavior in school was often 'exemplary.'"[17] Appendix 1 at 8. Thus, the jury could have given effect to Smith's mitigating evidence by answering the future dangerousness special issue negatively. Indeed, this Court has repeatedly held that similar evidence was within the scope of the special issues. *See, e.g., Johnson*, 509 U.S. at 356; *Graham*, 506 U.S. at 463; *Franklin*, 487 U.S. at 168; *Jurek*, 428 U.S. at 266-67. As a result, certiorari should be denied.

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[17] Smith argued during punishment that he was a candidate for rehabilitation and that he would prosper in "a controlled environment" such as prison. 33 RR 45-46, 53-54, 66-69. Smith also pointed out the fact that he had no disciplinary incidents during the six months he was incarcerated awaiting trial. *Id.* at 53-55.

B. This Court's opinion in *Tennard* did not impugn the lower court's application of *Penry I*.

In *Tennard,* the petitioner presented evidence during the punishment phase of trial that he had an IQ score of 67 and that his low IQ and gullible nature mitigated his culpability. 124 S. Ct. at 2566. During federal habeas proceedings, Tennard argued that *Penry I* error occurred because the jury was unable to give effect to this evidence in answering the deliberateness and future dangerousness special issues. *Tennard v. Cockrell,* 284 F.3d 591, 595 (5th Cir. 2002), *reinstated,* 317 F.3d 476 (5th Cir. 2003), *rev'd,* 124 S. Ct. 2562 (2004). In adjudicating the claim, the Fifth Circuit cited its well known two-part test, which sought to determine (1) whether the mitigating evidence introduced at trial was "constitutionally relevant,"[18] and (2) whether the evidence was beyond the effective reach of the jury in answering the special issues. *Id.* (citing *Davis v. Scott,* 51 F.3d 457, 460 (5th Cir. 1995), *abrogated by Tennard,* 124 S. Ct. at 2569-72). The court of appeals then rejected Tennard's *Penry I* claim because his IQ score evidence did not satisfy the threshold constitutional relevance standard, *i.e.,* it was not evidence of a severe handicap that was causally connected to the crime. *Id.* at 596-97 (citing *Boyd v. Johnson,* 167 F.3d 907, 912 (5th Cir. 1999), *Lackey v. Scott,* 28 F.3d 486, 489-90 (5th Cir.1994), and *Andrews v. Collins,* 21 F.3d 612, 629-30 (5th Cir.1994)). The Fifth Circuit did not reach the second stage of the *Davis* analysis.

This Court reversed, holding that the Fifth Circuit's constitutional relevance test was an "improper legal standard" with "no basis in [Supreme Court] precedents," and the correct

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[18] The court of appeals explained that, "[t]o be constitutionally relevant, the evidence must show (1) a uniquely severe permanent handicap with which the defendant was burdened through no fault of his own, ... and (2) that the criminal act was attributable to this severe permanent condition." *Tennard v. Cockrell,* 284 F.3d at 595 (internal quotations omitted).

standard to be applied was *only* whether the evidence was within the effective reach of the jury in answering the special issues. *Tennard,* 124 S. Ct. at 2569-72. Because the Fifth Circuit had not considered this question, and reasonable jurists might disagree as to the outcome, the Court granted a certificate of appealability and remanded for further review. *Id.* at 2572-73. The Court also determined that "reasonable jurist[s] could conclude that the jury might well have given Tennard's low IQ evidence aggravating effect in considering his future dangerousness, not only as a matter of probable inference from the evidence *but also because the prosecutor told them to do so.*" *Id.* at 2572 (emphasis added). However, the Court did *not* hold that Tennard's jury necessarily gave the evidence *only* aggravating effect and, thus, did not actually find *Penry I* error.

In resolving Smith's claim, the lower court adopted and applied the Fifth Circuit's constitutional relevance analysis.[19] Appendix 1 at 6-7. However, the court also addressed the proper issue identified in *Tennard*: whether Smith's mitigating evidence was within the effective reach of the jury in answering the special issues. *Id.* at 6-9. The court below recognized *Penry I* as the controlling precedent and compared Smith's mitigating evidence to Penry's.[20] *Id.* at 5-6. The court then specifically addressed how this evidence was relevant to the special issues in a mitigating way. *Id.* at 7-8. The court below did not "screen out any positive aspect" of Smith's mitigating evidence before conducting its *Penry I* analysis, as the Fifth Circuit erroneously did in *Tennard.* 124 S. Ct. at 2570-71. Thus, the court did not

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[19] It should be noted that the Court of Criminal Appeals adopted a four-part restatement of the constitutional relevance analysis. Appendix 1 at 7 (citing *Robertson v. Cockrell,* 325 F.3d 243 (5th Cir.) (*en banc*), *cert. denied,* 124 S. Ct. 28 (2003)). This revised standard — addressing voluntariness, permanence, severity, and attribution — was first articulated by the *en banc* Fifth Circuit in 2003 and was not at issue in *Tennard.*

[20] The court also noted that the evidence supporting Smith's *Penry I* claim was more like the evidence in *Robertson* than the evidence in *Tennard. Smith,* 132 S.W.3d at 413 n.19.

resolve Smith's claim under an improper legal standard because it applied the proper standard in the alternative. Nevertheless, the holding of *Tennard, i.e.*, reasonable jurists would debate the application of *Penry I* to the facts of Tennard's case, is immaterial here, where the debatability of the lower court's conclusion is not at issue. 124 S. Ct. at 2573 (citing *Slack v. McDaniel,* 529 U.S. 473, 484 (2000)). Finally, *Tennard* is distinguishable because the prosecutor in the instant case did *not* argue that Smith's troubled family history or intellectual limitations were irrelevant or would make him more dangerous. *Cf. id.* at 2572-73; 33 RR 17-33, 70-84. Consequently, *Tennard* is inapposite to the instant case, and certiorari should be denied.

III. The Court below Properly Held That the Mere Submission of a Supplemental Instruction Concerning Mitigating Evidence Does Not Amount to *per se* Eighth Amendment Error Regardless of the Quality or Quantity of the Mitigating Evidence Presented at Trial.

In *Penry II,* this Court granted certiorari in order to decide whether the supplemental instruction given during Penry's retrial — an instruction similar to the one at issue here — "complied with [the Court's] mandate in *Penry I.*" *Penry II,* 532 U.S. at 786. The Court first reiterated its holding in *Penry I* — that the mitigating evidence presented at Penry's 1980 trial was "relevant only as an *aggravating* factor" to the special issues — and explained that Penry was retried in 1990, where "the defense again put on extensive evidence regarding Penry's mental impairments and childhood abuse." *Id.* at 787-88. The Court then considered whether the Texas court had "unreasonably applied" *Penry I* by its endorsement of the supplemental instruction. *Id.* at 796-804.

The Court recognized "two possible ways" to interpret the supplemental instruction:

> First, ... it can be understood as telling the jurors to take Penry's mitigating evidence into account in determining their truthful answers to each special issue. Viewed in this light, however, the supplemental instruction placed the

> jury in no better position than was the jury in *Penry I.* As we made clear in *Penry I,* none of the special issues is broad enough to provide a vehicle for the jury to give mitigating effect to *the evidence of Penry's mental retardation and childhood abuse.* In the words of Judge Dennis below, the jury's ability to consider and give effect to Penry's mitigating evidence was *still "shackled and confined within the scope of the three special issues.* Thus, because the supplemental instruction had *no practical effect,* the jury instructions at Penry's second sentencing were *not meaningfully different* from the ones we found constitutionally inadequate in *Penry I.*
>
> Alternatively, ... it is possible to understand the supplemental instruction as informing the jury that it could "simply answer one of the special issues 'no' if it believed that mitigating circumstances made a life sentence ... appropriate ... regardless of its initial answers to the questions."

Penry II, 532 U.S. at 798 (emphasis added, internal citations omitted).

While the first interpretation effected no change, the second rendered the jury charge "internally contradictory" because the jury was also instructed that a "yes" answer to a special issue was appropriate only where supported by evidence proved beyond a reasonable doubt and a "no" answer was called for only when there was a reasonable doubt. *Penry II,* 532 U.S. at 799. The supplemental instruction directed the jury to "change one or more truthful 'yes' answers to an untruthful 'no' answer in order to avoid a death sentence." *Id.* The Court reasoned:

> Here, ... it would have been both logically and ethically impossible for a juror to follow [the] instructions. *Because Penry's mitigating evidence did not fit within the scope of the special issues,* answering those issues in the manner prescribed on the verdict form necessarily meant ignoring the command of the supplemental instruction. And answering the special issues in the mode prescribed by the supplemental instruction necessarily meant ignoring the verdict form instructions. Indeed, jurors who wanted to answer one of the special issues falsely to give effect to the mitigating evidence would have had to violate their oath to render a "true verdict."

Id. at 799-800 (emphasis added, internal citations omitted). This mechanism created "a

reasonable likelihood that the jury applied the challenged instruction in a way that prevented the consideration of Penry's mental retardation and childhood abuse." *Id.* at 800 (internal quotations omitted).

Thus, neither of the two possible views of the supplemental instruction cured the error recognized in *Penry I*. The first left the jury in same position as before, with no way to give effect to mitigating evidence that was only relevant to the special issues in an *aggravating* way. Conversely, the second advised the jury to render a false verdict because Penry's evidence was not relevant to the special issues in any *mitigating* way. However, both arguments rest on the same foundation: that Penry's evidence of mental retardation, brain damage, and severe child abuse was beyond the scope of the special issues. In essence, the supplemental instruction did not *create* new error; rather, the instruction simply *failed to correct* the error identified in *Penry I* because, during Penry's retrial, the jury was again faced with mitigating evidence that compelled affirmative answers to the special issues and created a likelihood that the jury was unable to ethically assess a life sentence if it so chose.

It follows that evidence with *some* mitigating relevance to the special issues, even if it were also aggravating, would not result in *Penry II* error because the jury's "no" answers would not be false. Rather, the jury would remain "shackled and confined" within the scope of the special issues, and its negative answers would reflect a legitimate, reasonable doubt regarding the State's evidence, as before. *See Robertson,* 325 F.3d at 258 (where the "culpability-mitigating evidence is encompassed by the Texas special issues, there is no need to provide an additional vehicle for it"), *abrogated on other grounds by Tennard,* 124 S. Ct. at 2569-72. As in *Robertson,* "[t]he jury was not forced into the position — as they were in *Penry II* — of falsely answering "no" to the questions of deliberateness or future dangerousness. The most that one could say is that the supplemental instruction was

redundant."[21] *Id.* Thus, there can be no *per se* error as a result of the supplemental instruction.[22] Moreover, *Penry II* continued the case-specific analysis mandated in the Court's opinions discussed *supra.* Indeed, there is no way of determining the likelihood of *Penry I* error without examining the nature of the mitigating evidence presented. As the Court explained in *Boyde,* "[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." 494 U.S. at 380-81. In Smith's case, because the mitigating evidence presented was not beyond the scope of the special issues, and there was no reasonable likelihood that the jury was precluded from truthfully answering the special issues in order to give it effect, neither interpretation of the supplemental instruction could result in constitutional error.

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[21] In any event, the supplemental instruction submitted in this case was dissimilar to the one submitted in *Penry II* because the jury was explicitly told that it was *obligated* to consider any mitigating evidence that might reduce Smith's personal or moral culpability or blameworthiness even if it was unrelated to the special issues. Appendix 1 at 9-10. Further, the instruction *required* the jury to equate diminished culpability with reasonable doubt and, thus, to truthfully answer the special issues negatively in order to reflect such a reasonable doubt. *Id.* at 9-10 & n.33. As a result, the supplemental instruction "provided 'a more capacious vehicle than was constitutionally warranted'" because "it explicitly put a burden on the State to prove, beyond a reasonable doubt, that the death penalty should be imposed despite any mitigating evidence." *Id.* (quoting *Robertson,* 325 F.3d at 258).

[22] In fact, given the Court's reluctance to extend *Penry I* beyond its facts in light of *Teague,* the conclusion that the supplemental instruction created *per se* error would be *Teague*-barred. *See Robertson,* 325 F.3d at 255 (holding that, "[t]hough one might argue ... that *Penry II* silently modifies *Penry I* and encroaches upon *Jurek,* such an act is expressly forbidden by *Teague*"). Although *Teague* does not directly apply to the instant proceeding, the State's interest in finality nonetheless outweighs Smith's interest in the retroactive application of any new rule of constitutional law.

CONCLUSION

For the foregoing reasons, Smith's petition for writ of certiorari should be denied.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

BARRY R. McBEE
First Assistant Attorney General

DON CLEMMER
Deputy Attorney General
For Criminal Justice

GENA BUNN
Chief, Postconviction
Litigation Division

*EDWARD L. MARSHALL
Deputy Chief, Postconviction
Litigation Division

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Tel: (512) 936-1400
Fax: (512) 320-8132
Email: elm@oag.state.tx.us

ATTORNEYS FOR RESPONDENT

*Counsel of Record

No. 04-5323

IN THE
SUPREME COURT OF THE UNITED STATES

LAROYCE LATHAIR SMITH,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Court of Criminal Appeals of Texas

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PROOF OF SERVICE

I hereby certify that on the 10th day of September, 2004, one copy of Respondent's Brief in Opposition was mailed, postage prepaid, to Jordan Steiker, Attorney at Law, 727 East Dean Keeton Street, Austin, Texas, 78705. All parties required to be served have been served. I am a member of the Bar of this Court.

EDWARD L. MARSHALL
Deputy Chief, Postconviction Litigation Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400

ATTORNEY FOR RESPONDENT

ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 10, 2004

The Honorable William K. Suter
Clerk, United States Supreme Court
Office of the Clerk
1 First Street, N.E.
Washington, D.C. 20543

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Re: *Smith v. Texas*, No. 04-5323

Dear Mr. Suter:

Enclosed for filing with the papers in the above styled cause are the original and nine copies of Respondent's Brief in Opposition. Also enclosed is the Proof of Service Form. Please indicate the date of filing on the enclosed copy of this letter and return it to me in the post-paid envelope provided.

By copy of this letter, I am forwarding a copy of said brief to counsel for Petitioner.

Thank you for your kind assistance in this matter.

Yours truly,

EDWARD L. MARSHALL
Deputy Chief, Postconviction Litigation Division
(512) 936-1400

ELM/skw
Enclosures
c: Jordan Steiker
Attorney at Law
727 East Dean Keeton Street
Austin, Texas 78705